Saabani Kigongobero & Anor v Public Prosecutor and another appeal

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS W-05–287–11 OF 2012 AND W-05–288–11 OF 2012
BALIA YUSOF, MOHTARUDIN BAKI AND TENGKU MAIMUN JJCA
17 FEBRUARY 2014

Criminal Law — Dangerous drugs — Trafficking in dangerous drugs — Trafficking in 1410.8g of methamphetamine — Appeal against — Conviction and sentence — Dangerous drugs found in plastic bags carried by appellants — Whether appellants' reaction sufficient to infer knowledge of drugs — Whether appellants' defence consistent and not afterthought — Failure to conduct proper investigation — Failure to produce relevant witnesses who could corroborate defence — Reasonable explanation given explaining presence of dangerous drugs — Dangerous Drugs Act 1952 s 39B(2)

Evidence — Presumptions — Adverse inference under s 114(g) of the Evidence Act 1950 — Drug trafficking charge — Failure of prosecution to produce witness who could corroborate defence — Material witness — Whether adverse inference invoked — Evidence Act 1950 s 114(g)

A team of police laying surveillance at Hotel Dragon Inn, Jalan Petaling, Kuala Lumpur had seen the appellants coming out of the hotel. The first appellant was carrying a pink plastic bag while the second appellant, a black plastic bag. The appellants then took a taxi to Jalan Dutamas Seroja 3. The second appellant was arrested when he alighted from the taxi and the first appellant was arrested whilst he was inside the taxi, paying for the fare. Inside both the pink bag and the black bag, the police found packages containing methamphetamine. The police also found four pairs of sandals in the bags. Subsequently, the police arrested one Anyoujo at the second appellant's house and one Vincent at the first appellant's house. The appellants were charged under s 39B(2) of the Dangerous Drugs Act 1952 for trafficking in 1410.8g methamphetamine. The first appellant claimed that Vincent was the brother in law of a friend named Emmky. Emmky had asked the first appellant to assist in retrieving a sample from someone to be handed over to another friend in Dutamas to be brought back to Africa. According to the first appellant, Vincent was aware about the request that Emmky made to him. The first appellant claimed that Emmky had asked him to meet one Christina at Hotel Dragon Inn. The second appellant who was familiar with the area took the first appellant to Petaling Street. The second appellant was carrying a black plastic

bag at that time. Christina took two pairs of sandals and put them into a pink bag and handed the pink bag to the first appellant. As the pink bag could not contain all the sandals that were taken out by Christina, she put another two pairs into the black bag carried by the second appellant. They then left the hotel and took a taxi to Dutamas. The second appellant's version was consistent with the first appellant version of what took place. The learned trial judge found that the defence had failed to raise a reasonable doubt on the prosecution case. The appellants were thus convicted and sentenced to death. The appellants appealed against conviction and sentence.

Held, allowing the appeals and setting aside the convictions:

(1) The evidence established that prior to the arrest, when the appellants were seen coming out of the hotel, the appellants were not behaving suspiciously. At the time of the arrest, the evidence of the taxi driver ('SP4') and the arresting officer ('SP6') revealed that the arrest on the first appellant happened very fast. He was pulled out of the taxi whilst he was making payment for the fare. The evidence suggested that there was no opportunity for the first appellant to run away. In a situation where the police had suddenly pounded on the first appellant in the taxi, it is reasonable to expect the first appellant to display the reaction of 'terkejut'. Therefore, such conduct alone was not sufficient to infer knowledge of the drugs on the first appellant (see para 20).

(2) As for the second appellant, there was no evidence of any resistance on the arrest or any attempt to run away. There was no evidence led to suggest any situation that made it impossible for the second appellant to run away from the police. There was thus no basis for the learned trial judge to make a finding that the second appellant could not run away because the situation made it impossible for him to do so (see para 21).

(3) Throughout the proceedings, the first appellant was consistent in his defence that he had no knowledge of the drugs; that he was merely collecting the sample from Christina as requested by Emmky and that Vincent knew about this request (see para 23).

(4) The defence could not be said to be an afterthought or a recent invention as the defence was put to the prosecution witnesses. The trial judge seriously misdirected himself in stating that the defence was an afterthought and a recent invention (see para 25).

(5) The evidence of the first appellant was that he did inform the police about Christina and Emmky and about the fact that Vincent knew about his conversation with Emmky and the request to collect the sample for Emmky. No investigation was conducted on Christina. Although Vincent (a South African national) was arrested, he was later deported. The first appellant had thus lost the opportunity of any evidence from

Vincent that could corroborate his version particularly on the request by Emmky for him to collect the sample, which evidence could cast a reasonable doubt on the prosecution case. The accused cannot be penalised for lack of ingenuity in police investigations depriving him of the time honoured benefit of doubt (see para 26).

(6) As regards the submission that the first appellant should have disclosed regarding Emmky and Christina to the police at investigation stage, an accused person has the right to remain silent. Further, referring to the cautioned statement of the appellants and the third accused, no question was asked of Hotel Dragon Inn or Dutamas in the cautioned statements. Hence, the first appellant could not be faulted for lack of any disclosure or statement, given the manner the questions were posed to him (see para 27).

(7) The learned trial judge had made a finding that the prosecution had failed to prove common intention. The second appellant did not know Emmky or Christina. Absent any pre-arranged plan between the appellants to go to the hotel and Dutamas to traffic in dangerous drugs, the appellants' version that the second appellant had agreed to go along with the first appellant to Petaling Street as he was familiar with the area coupled with the fact that the appellants' version as to the sequence of events on the particular day was corroborated by the third accused, the defence of the second appellant was not inherently incredible. His explanation on the sandals filled with drugs was a reasonable explanation. It was thus incumbent upon the learned trial judge to weigh the defence in the proper perspective, which His Lordship had failed to do (see para 30).

(8) The significance of Vincent, in particular, as a witness was not in respect of the narratives during the arrest and the seizure but in respect of whether he could confirm the first appellant's version that the meeting with Christina was at the request of Emmky in relation to the samples, which could lend credence to the first appellant's version that he knew nothing about the drugs. Viewed in that context, Vincent was a material witness and the failure to call or to offer Vincent for cross examination attracted the adverse inference under s 114(g) of the Evidence Act 1950 (see para 33).

[Bahasa Malaysia summary

Sekumpulan polis yang sedang memantau kawasan di Hotel Dragon Inn, Jalan Petaling, Kuala Lumpur telah melihat perayu-perayu keluar dari hotel. Perayu pertama telah membawa sebuah beg plastik merah jambu manakala perayu kedua, sebuah plastik hitam. Perayu-perayu kemudian mengambil teksi ke Jalan Dutamas Seroja 3. Tertuduh kedua telah ditangkap apabila dia turun dari teksi itu dan perayu pertama telah ditangkap semasa dia berada di dalam teksi,

membayar tambang. Di dalam kedua-dua beg merah jambu dan beg hitam itu, polis menemui bungkusan yang mengandungi methamphetamine. Polis juga mendapati empat pasang sandal dalam beg. Selepas itu, polis menahan seorang bernama Anyoujo di rumah perayu kedua dan seorang bernama Vincent di rumah perayu pertama. Perayu-perayu telah dituduh di bawah s 39B (2) Akta Dadah Berbahaya 1952 kerana mengedar 1410.8g methamphetamine. Perayu pertama mendakwa bahawa Vincent adalah adik ipar lelaki seorang rakan bernama Emmky. Emmky telah meminta perayu pertama membantu untuk mendapatkan semula sampel daripada seseorang yang akan diserahkan kepada seorang lagi rakan di Dutamas untuk dibawa balik ke Afrika. Menurut perayu pertama, Vincent sedar mengenai permintaan Emmky yang dibuat kepadanya. Perayu pertama mendakwa Emmky telah memintanya untuk bertemu seorang bernama Christina di Hotel Dragon Inn. Perayu kedua yang biasa dengan kawasan itu telah membawa perayu pertama ke Petaling Street. Perayu kedua membawa sebuah beg plastik hitam pada masa itu. Christina mengambil dua pasang sandal dan memasukkannya ke dalam beg merah jambu dan menyerahkan beg merah jambu kepada perayu pertama. Oleh kerana beg merah jambu tidak dapat memasukkan semua sandal yang telah dikeluarkan oleh Christina, dia meletakkan dua lagi pasang sandal ke dalam beg hitam yang dibawa oleh perayu kedua. Mereka kemudian meninggalkan hotel itu dan menaiki teksi ke Dutamas. Versi perayu kedua adalah selaras dengan versi perayu pertama berhubung apa yang telah berlaku. Hakim perbicaraan yang bijaksana mendapati bahawa pihak pembelaan telah gagal menimbulkan keraguan munasabah terhadap kes pendakwaan. Perayu-perayu itu didapati bersalah dan dihukum mati. Perayu-perayu membuat rayuan terhadap sabitan dan hukuman.

Diputuskan, membenarkan rayuan-rayuan dan mengetepikan sabitan-sabitan:

(1) Keterangan membuktikan bahawa sebelum tangkapan itu, apabila perayu-perayu telah dilihat keluar dari hotel itu, perayu-perayu tidak berkelakuan mencurigakan. Pada masa tangkapan itu, keterangan pemandu teksi ('SP4') dan pegawai tangkapan ('SP6') mendedahkan bahawa tangkapan perayu pertama berlaku sangat cepat. Dia telah ditarik keluar dari teksi semasa dia membuat bayaran tambang. Bukti mencadangkan bahawa tidak ada peluang bagi perayu pertama melarikan diri. Dalam keadaan di mana pihak polis telah tiba-tiba menerpa perayu pertama dalam teksi, ia adalah munasabah untuk menjangkakan perayu pertama memberikan reaksi 'terkejut'. Oleh itu, kelakuan itu sahaja tidak mencukupi untuk membuat kesimpulan berhubung pengetahuan tentang dadah itu terhadap perayu pertama (lihat perenggan 20).

(2) Bagi tertuduh kedua, tidak terdapat apa-apa keterangan mengenai apa-apa tentangan berhubung tangkapan atau apa-apa percubaan untuk melarikan diri. Tiada bukti yang mencadangkan apa-apa keadaan yang

membuat ia mustahil bagi tertuduh kedua melarikan diri daripada pihak polis. Dengan itu, tidak terdapat asas untuk percubaan hakim yang bijaksana untuk membuat suatu keputusan yang perayu kedua tidak boleh lari kerana keadaan yang dibuat mustahil bagi beliau untuk berbuat demikian (lihat perenggan 21).

(3) Di sepanjang prosiding itu, perayu pertama adalah konsisten dalam pembelaannya bahawa dia tidak mempunyai pengetahuan tentang dadah itu; bahawa dia hanya mengumpul sampel itu daripada Christina seperti yang diminta oleh Emmky dan Vincent mengetahui tentang permintaan ini (lihat perenggan 23).

(4) Pembelaan ini tidak boleh dikatakan sebagai suatu yang telah difikirkan kemudian atau ciptaan yang baru direka sebagai pembelaan yang dikemukakan kepada saksi-saksi pendakwaan. Hakim perbicaraan telah tersalah arah dalam menyatakan bahawa pembelaan itu adalah yang telah difikirkan kemudian atau ciptaan yang baru direka (lihat perenggan 25).

(5) Keterangan perayu pertama adalah bahawa dia telah memberitahu polis mengenai Christina dan Emmky dan tentang fakta bahawa Vincent mengetahui tentang perbualannya dengan Emmky dan permintaan untuk mengumpul sampel untuk Emmky. Tiada siasatan dijalankan ke atas Christina. Walaupun Vincent (seorang rakyat Afrika Selatan) ditangkap, dia kemudiannya telah dihantar pulang. Perayu pertama itu telah kehilangan peluang terhadap apa-apa keterangan daripada Vincent yang boleh menyokong versinya terutamanya berhubung permintaan oleh Emmky agar dia mengumpul sampel itu, yang mana keterangan itu boleh menimbulkan keraguan munasabah terhadap kes pendakwaan. Tertuduh tidak boleh dihukum kerana kurang kebijaksanaan dalam siasatan polis yang telah menafikan dia masa untuk memanfaatkan kelebihan keraguan (lihat perenggan 26).

(6) Berhubung hujah bahawa perayu pertama sepatutnya mendedahkan Emmky dan Christina kepada polis di peringkat siasatan, seseorang tertuduh mempunyai hak untuk berdiam diri. Selanjutnya, merujuk kepada penyataan beramaran daripada perayu dan tertuduh ketiga, tiada soalan telah diajukan tentang Hotel Dragon Inn atau Dutamas dalam penyataan beramaran itu. Oleh itu, perayu pertama tidak boleh dipersalahkan kerana kekurangan apa-apa penzahiran atau pernyataan, memandangkan cara soalan-soalan yang diajukan kepadanya (lihat perenggan 27).

(7) Hakim perbicaraan yang bijaksana telah membuat dapatan bahawa pihak pendakwaan telah gagal membuktikan niat bersama. Perayu kedua tidak mengenali Emmky atau Christina. Ketiadaan apa-apa rancangan yang diatur terlebih dahulu antara perayu-perayu untuk pergi ke hotel dan Dutamas untuk mengedar dadah berbahaya, versi perayu bahawa

perayu kedua telah bersetuju untuk pergi bersama-sama dengan perayu pertama ke Petaling Street kerana dia biasa dengan kawasan tersebut di samping dengan hakikat bahawa versi perayu-perayu berhubung urutan kejadian pada hari tertentu itu telah disokong oleh tertuduh ketiga, pembelaan perayu kedua memang tidak luar biasa. Penjelasannya berhubung sandal yang dipenuhi dengan dadah adalah penjelasan yang munasabah. Oleh itu, ia penting bagi hakim perbicaraan yang bijaksana untuk mengimbang pembelaan itu dalam perspektif yang betul, yang mana Yang Arif telah gagal berbuat demikian (lihat perenggan 30).

(8) Pentingnya Vincent, khususnya, sebagai saksi bukanlah berkenaan dengan naratif semasa tangkapan dan rampasan tetapi berkenaan dengan sama ada dia boleh mengesahkan versi perayu pertama bahawa pertemuan dengan Christina adalah atas permintaan Emmky berhubung dengan sampel itu, yang boleh meletakkan kepercayaan kepada versi perayu pertama bahawa dia tidak mengetahui apa-apa tentang dadah itu. Dilihat dalam konteks itu, Vincent adalah saksi utama dan kegagalan untuk memanggil atau menawarkan Vincent untuk pemeriksaan balas memberikan inferens bertentangan di bawah s 114(g) Akta Keterangan 1950 (lihat perenggan 33).]

Notes

For a case on adverse inference under s 114(g) of the Evidence Act 1950, see 7(2) *Mallal's Digest* (4th Ed, 2013 Reissue) para 2416.

For cases on trafficking in dangerous drugs, see 4(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 301–302.

Cases referred to

Kamalahassan a/l Latchimanan v PP [2008] 3 MLJ 810, CA (refd)
Masoumeh Gholami Khaveh v PP [2013] 5 MLJ 688, CA (refd)
Munusamy v PP [1987] 1 MLJ 492, SC (refd)
Pang Chee Meng v PP [1992] 1 MLJ 137, SC (refd)
Wong Swee Chin v PP [1981] 1 MLJ 212, FC (folld)

Legislation referred to

Dangerous Drugs Act 1952 ss 37(da), 39B(2)
Evidence Act 1950 s 114(g)
Penal Code s 34

Appeal from: Criminal Trial No 45A-22 of 2011 (High Court, Kuala Lumpur)

Afifuddin bin Ahmad Hafifi (Salehuddin Saidin & Associates) for the first appellant.
Hisyam Teh Poh Teik (Teh Poh Teik & Co) for the second appellant.

Awang Armadajaya bin Awang Mahmud (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Tengku Maimun JCA (delivering jugdment of the court):

[1] The appellant in W-05–287–11 of 2012 ('the first appellant') and the appellant in W-05–288–11 of 2012 ('the second appellant') were the first accused and the second accused respectively in the High Court. Both appellants, together with one Ling Yue ('the third accused') were charged under s 39B(2) of the Dangerous Drugs Act 1952 for trafficking in 1410.8g methamphetamine read together with s 34 of the Penal Code.

[2] The facts relevant to the appeal are briefly set out below. On 2 January 2011 at about 5pm, a team of police officers had laid surveillance at Hotel Dragon Inn, Jalan Petaling, Kuala Lumpur. They saw the appellants and the third accused coming out of the hotel. The first appellant was seen carrying a pink plastic bag while the second appellant, a black plastic bag. The third accused was seen walking behind the two men. The three boarded a taxi, driven by SP4. The first appellant was seated in the front passenger seat. The second appellant and the third accused were at the back passenger seat. The police team tailed the taxi until it stopped in front of a row of shop houses beside Jalan Dutamas Seroja 3.

[3] When the second appellant and the third accused alighted from the taxi, walking towards the shop houses, they were arrested by the police. The black bag was seized from the second appellant. The first appellant was arrested whilst he was inside the taxi, paying for the fare. From the foot well of the front passenger's seat, the police seized the pink bag.

[4] Inside both the pink bag and the black bag, the police found four packages, two packages in each bag. Each package contained a pair of sandals brand 'Y&Y'. Four pairs of sandals were thus recovered from the two bags. Inside the black bag, there was also a pair of high-heeled ladies shoe. Underneath the sandals, the police found a layer from where eight yellow packages wrapped in cellophane tape were recovered. The eight packages contained substances which were later confirmed by the chemist ('SP3') to be methamphetamine. The methamphetamine recovered from the pink bag weighed 683.7g and from the black bag, the weight was 727.1g.

[5] The police team was later led to the residence of the first appellant and the second appellant at Menara Manjalara, Bandar Manjalara, Kepong and at Condo Anggun Putri, Segambut respectively. The police did not find anything

illegal in the said houses. However, to facilitate investigations, the police arrested Anyoujo @ Ambrose at the second appellant's house and Vincent at the first appellant's house.

[6] At the end of the prosecution's case, the learned trial judge found that the element of common intention had not been proved. The learned trial judge acquitted and discharged the third accused. As against the appellants, the learned trial judge found that the prosecution had proven a prima facie case in respect of the drugs found in the plastic bags carried by them separately and individually. The charge was thus amended by the learned trial judge to omit s 34. The two appellants were called upon to enter their defence on the amended charge.

THE DEFENCE

[7] The first appellant, from Uganda, came to Malaysia in July 2010 to study and he stayed alone at Menara Menjalara until 27 December 2010 when Vincent, the brother-in-law of a friend named Emmky, joined him. On 27 December 2010, the first appellant received a call from Emmky asking the first appellant to assist in retrieving a sample from someone to be handed over to another friend in Dutamas to be brought back to Africa. Emmky did not specify the kind and the number of sample that was to be taken.

[8] On 31 December 2010 the first appellant received a phone call from Emmky reminding him to collect the sample. According to the first appellant, at that time Vincent was with him and Vincent was aware about the request that Emmky made to him. On 2 January 2011 the first appellant went to a church in Kepong for a New Year Mass. He then received a call from Emmky asking him to meet a Latvian lady by the name of Christina at room No 204, Hotel Dragon Inn, Petaling Street.

[9] After coming back from the church, the first appellant called the second appellant to wish him on the New Year. It happened that the second appellant was at KFC Kepong with the third accused. He went to meet the second appellant at KFC Kepong. He told the second appellant that he wanted to go to Hotel Dragon Inn at Petaling Street. Since the second appellant was familiar with the area, all three of them took a taxi to Petaling Street. The first appellant was aware that at that time, the second appellant was carrying a black plastic bag.

[10] The taxi dropped them at Petaling Street and they walked to Dragon Inn Hotel. On arrival at Dragon Inn, they went to room 204. The first appellant knocked the door and a white lady who introduced herself as Christina opened the door. The first appellant then called Emmky and passed

the mobile telephone to Christina. The first appellant heard the word 'okay' uttered by Christina many times over. He did not hear anything else. When Christina handed over the telephone back to him, he spoke to Emmky. Emmky had asked him to take the sample and bring it to Dutamas and to hand it over to someone who will call him later.

[11] Christina took two pairs of sandals and put them into a pink bag and handed the pink bag to the first appellant. As the pink bag could not contain all the sandals that were taken out by Christina, she put another two pairs into the black bag carried by the second appellant. They then left the hotel.

[12] They took another taxi to Dutamas. Throughout the journey the first appellant did not receive any calls from Emmky or his friend. Upon arrival at Dutamas, he instructed the taxi driver to stop in front of a row of shop houses to buy a mobile telephone reload card to make a call to Emmky. When he was arrested, he did inform the police about the samples, Emmky and Christina. Only after the appellants and the third accused were taken to the police station that the first appellant knew the sandals were filled with drugs. The first appellant also told the police that the second appellant was merely following him to the place.

[13] The second appellant, a Nigerian, gave evidence on the black plastic bag that he was carrying. His testimony was that prior to going to KFC Kepong, he and the third accused, who was his girlfriend, had gone to BB Plaza at Bukit Bintang. Because of the shoes she was wearing, the third accused had pains in her legs. The second appellant then bought her a pair of slippers. She changed to the new slippers. Her high heeled shoes were put in the box in a black plastic bag and he had with him at all times the black plastic bag and the box from the shoe shop.

[14] The second appellant's version was consistent with the first appellant on the meeting at KFC Kepong; on the meeting with Christina at the hotel; on the two pairs of sandals given to the first appellant in the pink plastic bag; and on the two pairs of sandals given to him as they could not fit into the pink plastic bag. The second appellant's version was also consistent with the first appellant on the evidence that the taxi driver was asked to stop for the first appellant to reload his mobile to call his friend about the sample. The second appellant similarly said that he had no knowledge that there were drugs in the two sandals that he was carrying in the plastic bag.

[15] The third accused gave evidence on behalf of the defence. She confirmed the second appellant's version of the trip to BB Plaza; the shoes and the new slippers; the meeting with the first appellant at KFC Kepong; the trip to Petaling Street; the meeting with Christina at Hotel Dragon Inn and the stop

in front of the shop houses at Dutamas for the first appellant to buy a (reload) card. It was further her evidence that she had never seen the second appellant with drugs.

[16] The learned trial judge found that the defence has failed to raise a reasonable doubt on the prosecution case. The appellants were thus convicted and sentenced to death.

THE APPEAL

[17] Before us, learned counsel for the first appellant canvassed the following grounds of appeal:

(a) whether the learned trial judge had made a correct finding of inference of knowledge upon the first appellant based on conduct;

(b) that the learned trial judge erred in law and in fact in finding that defence was an afterthought and a recent invention;

(c) the invocation of s 114(g) of the Evidence Act 1950 by the non-calling and non-offering of Vincent; and

(d) the identity of exhibits and s 34 of the Penal Code.

[18] The second appellant's complaint was that the learned trial judge had failed to appreciate the defence of the second appellant that he had merely accompanied the first appellant to the hotel. Learned counsel for the second appellant adopted the submission of learned counsel for the first appellant in respect of the other issues raised.

Conduct and the inference of knowledge

[19] The learned trial judge had made a finding of mens rea possession and proceeded to find trafficking under s 37(da) of the Dangerous Drugs Act 1952. In finding that the prosecution had proved possession, the learned trial judge relied on the conduct of the appellants to infer that the appellants had knowledge of the drugs in the sandals. This is what the learned trial judge said:

> [45]… Tertuduh Pertama cuba untuk melarikan diri daripada ditangkap setelah SP6 memperkenalkan diri sebagai pegawai polis dan cuba menangkap beliau. Tertuduh Kedua masa ditangkap walaupun tiada pergelutan dan gagal melarikan diri tidak bermakna tiada pengetahuan tentang dadah oleh kerana situasi ketika itu tidak memungkinkan beliau untuk melarikan diri …

[20] The evidence established that prior to the arrest, when the appellants were seen coming out of the hotel, the appellants were not behaving

suspiciously. At the time of the arrest, a perusal of the evidence of the taxi driver ('SP4') and the arresting officer ('SP6') revealed that the arrest on the first appellant happened very fast. He was pulled out of the taxi whilst he was making payment for the fare. The evidence of SP6 was 'Masa membuka pintu saya kenalkan diri sebagai polis dan dia terkejut kemudian saya kilas tangan kirinya dia cuba melawan kemudian saya tarik dia keluar dan tiarapkannya di atas jalan.' The evidence suggests that there was no opportunity for the first appellant to run away. In a situation where the police had suddenly pounded on the first appellant in the taxi, it is reasonable to expect the first appellant to display the reaction of 'terkejut'. In fact SP6 admitted that 'terkejut' was a reasonable reaction. Therefore, in our view, such conduct alone is not sufficient to infer knowledge of the drugs on the first appellant.

[21] As for the second appellant, there was no evidence of any resistance on the arrest or any attempt to run away. The evidence of SP8 was '… OKT2 selepas saya kenalkan diri sebagai polis dia tak ada baling beg dan tak cuba larikan diri.' Naturally, there was no evidence led to suggest any situation that made it impossible for the second appellant to run away from the police. There was thus no basis for the learned trial judge to make a finding that the second appellant could not run away because the situation made it impossible for him to do so.

Defence an afterthought/recent invention

[22] The learned trial judge's evaluation of the defence is as follows:

> [44] Daripada keterangan saksi-saksi pembelaan, nampaknya pembelaan Tertuduh Pertama dan Tertuduh Kedua dalam kes ini adalah bahawa mereka hanyalah 'innocent carrier'. Mereka bersama-sama menyatakan bahawa mereka langsung tidak mempunyai pengetahuan tentang dadah-dadah yang tersorok di dalam tapak sandal-sandal yang mereka bawa pada masa tangkapan. Mereka menyatakan telah menerima sandal-sandal tersebut daripada seorang wanita bangsa Latvia bernama Christina di Hotel Dragon Inn untuk dihantar kepada seorang kawan Emmky di Dutamas untuk dihantar ke Afrika Selatan sebagai sampel. Keterangan Tertuduh Pertama dan Tertuduh Kedua mengenai perkara material dalam keterangan mereka telah disokong oleh keterangan Ling Yue. Kedua-dua Tertuduh menafikan mereka sedar terlibat dalam pengedaran dadah syabu yang hal perkara pertuduhan terhadap mereka.
>
> [45] Selepas meneliti keseluruhan keterangan yang dikemukakan di hadapan Mahkamah ini, saya dapati bahawa pihak pembelaan telah gagal untuk menimbulkan sebarang keraguan yang munasabah terhadap kebenaran kes pihak pendakwaan. Keterangan saksi pendakwaan jelas menunjukkan bagaimana Tertuduh-Tertuduh yang dilihat masing-masing memegang sebuah beg plastik berisi sandal-sandal yang digunakan untuk menyorok dadah-dadah berbahaya sambil berjalan keluar dari Hotel Dragon Inn, menaiki teksi dan akhirnya ditangkap bersama bag masing-masing yang berisi dadah di Dutamas Saroja 3 …

A [46] Keterangan Tertuduh-Tertuduh bahawa sandal-sandal tersebut sebagai sampel tidak menyakinkan dan tidak boleh dipercayai. Sekiranya benar sandal-sandal tersebut untuk dijadikan sebagai sampel mengapakah memerlukan empat pasang sandal dalam jenama Y&Y yang serba serbinya sama dari segi rupabentuk, sais, patent dan sebagainya sama. Jika sandal-sandal tersebut hendak dijadikan sebagai
B sampel, satu pasang sudah memadai dan tidak perlu empat pasang sandal yang sama. Dari sini tidakkah timbul sesuatu yang aneh kepada Tertuduh-Tertuduh untuk memeriksa dan meneliti sandal-sandal yang diberikan oleh Christina tersebut kepada mereka. Oleh itu pembelaan 'innocent carrier' oleh Tertuduh-Tertuduh tidak dapat dipercayai dan tidak boleh diterima oleh Mahkamah ini.

C [47] Cerita Tertuduh Pertama bahawa kawan beliau bernama Emmky yang meminta tolong beliau ambilkan sampel. Beliau tidak tahu apakah sampel tersebut sehinggalah ianya ditunjukkan oleh Christina dibilik Hotel Dragon Inn. Pada masa itu barulah Tertuduh Pertama tahu sampel tersebut adalah 4 pasang sandal yang serupa. Cerita Tertuduh Pertama ini juga tidak munasabah oleh kerana beliau
D hanyalah seorang kawan kepada Emmky sedangkan Vincent adalah adik ipar kepada Emmky tinggal bersama Tertuduh Pertama. Mengapakah seorang adik iparnya tidak terlibat atau tidak disuruh oleh abang iparnya sendiri iaitu Emmky untuk melakukan tugas tersebut. Persoalan ini tidak dapat dijelaskan oleh Tertuduh Pertama. Sekiranya benar Emmky wujud maka sudah tentu beliau lebih
E mengharapkan atau lebih mempercayai Vincent untuk melakukan kerja mengambil sampel tersebut dan bukannya Tertuduh Pertama.

[48] Setelah meneliti keterangan saksi-saksi pihak pembelaan, terdapat banyak kejadian yang berlaku secara kebetulan. Secara kebetulan mereka bertemu di KFC
F Kepong, kebetulan Tertuduh Kedua tahu Petaling Street, kebetulan tiada kredit untuk panggil Emmky dan sebagainya. Pembelaan sedemikian rupa adalah pembelaan yang lemah dan tidak menimbulkan keraguan terhadap kes pendakwaan …

[49] Saya mendapati pembelaan Tertuduh-Tertuduh hanyalah rekaan semata-mata
G dan hanyalah satu pemikiran terkemudian. Cerita Tertuduh-Tertuduh mengenai Emmky, Christina dan sample tidak boleh dipercayai. Oleh itu pembelaan Tertuduh-Tertuduh adalah tidak benar, tidak dapat diterima, rekaan semata-mata, recent invention dan satu afterthought. Pembelaan sedemikian tidak dapat melepaskan Tertuduh-Tertuduh daripada pertuduhan yang mereka hadapi (lihat
H *Public Prosecutor v Lim Lian Chen* [1992] 2 MLJ 561, *Wong Swee Chin v Public Prosecutor* [1980] 1 LNS 138, *Hamidon bin Mat Yatin v Public Prosecutor* [1995] 3 CLJ 735 dan *Public Prosecutor v Ling Tee Huah* [1982] 2 MLJ 324; [1980] 1 LNS 212).

I **[23]** Throughout the proceedings, the first appellant was consistent in his defence that he had no knowledge of the drugs; that he was merely collecting the sample from Christina as requested by Emmky and that Vincent knew about this request. This version was put to the prosecution witnesses SP5, SP6,

SP7 and SP8. Except for SP8, the prosecution witnesses denied that they knew about Christina. As for SP8, the following was his evidence in cross-examination:

> Q : Saya katakan taklimat ada nyatakan ada seorang yang menyewa, bukan OKT1, 2 & 3 di Hotel Dragon Inn tersebut; betul?
>
> A : Ya.
>
> Q : Saya katakan bahawa orang yang menyewa di hotel tersebut bernama Christina, seorang perempuan Latvia, betul?
>
> A : Betul.

In re-examination, SP8 said 'Dalam pemeriksaan balas sebentar tadi saya bersetuju yang dalam taklimat itu ada beritahu seorang wanita warga Latvia bernama Christina tinggal di hotel itu sebab tadi tidak jelas pertanyaan itu.'

[24] We find it hard to accept the clarification of SP8 above. What was asked of him about Christina was not a convoluted question. It was a short and straight-forward question to which he had given a short and straight answer. It would seem to us that his answer in re-examination was to rectify what had been said in cross-examination.

[25] In *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212 the Federal Court had stated the general rule that failure of a defence to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony. Applying the general rule aforesaid, it is the duty of the defence to put their case to the prosecution witnesses and failure to do so will render the defence being labelled as an afterthought or a recent invention. In the present case, the defence could not be said to be an afterthought or a recent invention as the defence was put to the prosecution witnesses. The learned trial judge had therefore seriously misdirected himself in stating that the defence was an afterthought and a recent invention.

[26] Further, it must be highlighted that the evidence of the first appellant was that he did inform the police about Christina and Emmky and about the fact that Vincent knew about his conversation with Emmky and the request to collect the sample for Emmky. Obviously no investigation was conducted on Christina as except for SP8, the prosecution witnesses said that they had no knowledge of Christina and although Vincent (a South African national) was arrested, he was later deported for having previous criminal record. The first appellant had thus lost the opportunity of any evidence from Vincent that could corroborate his version particularly on the request by Emmky for him to collect the sample, which evidence could cast a reasonable doubt on the prosecution's case. As stated in *Pang Chee Meng v Public Prosecutor* [1992] 1

MLJ 137 the accused cannot be penalised for lack of ingenuity in police investigations depriving him of the time-honoured benefit of doubt.

[27] As regards Christina, it was the submission of learned deputy public prosecutor that the police had no information about her and that there was no disclosure from the first appellant on Christina and this goes to the veracity, accuracy and truthfulness of the defence. Learned deputy further submitted that if the first appellant was serious in his defence, Emmky and Christina would have been disclosed to the police at investigation stage.

[28] We bear in mind the principle that an accused person has the right to remain silent. Be that as it may, at this juncture we think it is pertinent to refer to the cautioned statement of the appellants and the third accused where we noted that notwithstanding the fact that different police officers recorded the cautioned statements, the questions and answers found in the respective cautioned statements (exhs D50, D51 and D52) are word for word the same which consist of only seven questions and to the question asked 'Do you give this statement to me voluntarily' the answer was 'Im not understand what you say.' There was no question asked of Hotel Dragon Inn or Dutamas in the cautioned statements. In the circumstances, even if we were to accept that the first appellant did not make any disclosure on Christina, surely the first appellant could not be faulted for lack of any disclosure or statement, given the manner the questions were posed to him.

[29] In respect of the second appellant, the ground of appeal put forth was that the learned trial judge had failed to evaluate his defence that he merely accompanied the first appellant to the place.

[30] Indeed, there does not seem to be a need for the learned trial judge to evaluate the defence having found that it was one of an afterthought and a recent invention. However, the learned trial judge had made a finding that the prosecution has failed to prove common intention. The second appellant did not know Emmky or Christina. Absent any pre-arranged plan between the appellants to go to the hotel and Dutamas to traffic in dangerous drugs, the appellants' version that the meeting at KFC Kepong was by chance and that the second appellant had agreed to go along with the first appellant to Petaling Street as he was familiar with the area coupled with the fact that the appellants' version as to the sequence of events on the particular day was corroborated by the third accused, we are of the view that the defence of the second appellant is not inherently incredible. His explanation on the sandals filled with drugs was a reasonable explanation. It is thus incumbent upon the learned trial judge to weigh the defence in the proper perspective, which His Lordship has failed to do.

Invocation of s 114(g) of the Evidence Act 1950

[31] It was not in dispute that Vincent was arrested at the first appellant's house and was brought to the police station together with the appellants. Although from the beginning it was put to the prosecution witnesses that Vincent knew of the request by Emmky, Vincent was not called by the prosecution nor offered to the defence. Citing the case of *Masoumeh Gholami Khaveh v Public Prosecutor* [2013] 5 MLJ 688, it was the submission of learned counsel for the first appellant that the learned trial judge had misdirected himself in law and in fact in brushing aside the issue of Vincent on the ground that he was not present during the arrest.

[32] The finding by the learned trial judge on this issue was as follows:

> [32]… peguambela berhujah Vincent, Anyoujo @ Ambrose dan Christina adalah saksi-saksi penting dalam kes ini. Kegagalan pihak pendakwaan untuk memanggil dua penama tersebut telah mencacatkan kes pendakwaan dan boleh menarik pemakaian anggapan di bawah seksyen 114(g) Akta Keterangan 1950. Dengan hormatnya, pihak pendakwaan mempunyai budi bicara dalam memanggil mana-mana saksi untuk membuktikan pertuduhan terhadap tertuduh…. Pihak pendakwaan telah menjelaskan bahawa penama Christina tidak disiasat oleh kerana kekurangan maklumat diberikan oleh tertuduh-tertuduh. Penama Christian dan Anyoujo @ ambrose tidak penting untuk kes pendakwaan dan tidak dipanggil atau ditawarkan oleh kerana dua saksi itu tidak berada di tempat kejadian. Sekiranya dua penama dipanggil pun mereka hanya dapat mengesahkan bahawa Tertuduh Pertama dan Tertuduh Kedua tidak membawa sebarang beg semasa keluar dari rumah. Tertuduh-Tertuduh tersebut telah ditangkap di Dutamas Seroja 3 bersama-sama dengan beg mengandungi dadah. Dua penama tersebut tidak mempunyai sebarang pengetahuan tentang kejadian tangkapan dan rampasan tersebut. Oleh itu pihak pendakwaan tidak dalam kedudukan untuk menghalang atau menyembunyikan apa-apa fakta mengenai tangkapan dan rampasan barang kes dalam kes ini. Oleh itu anggapan di bawah seksyen 114(g) Akta Keterangan 1950 tidak boleh terpakai terhadap pihak pendakwaan atas kegagalan untuk memanggil atau menawarkan tiga penama tersebut.

[33] The learned trial judge came to the conclusion that Vincent, Christina and Anyoujo were not material witnesses because they were not at the scene when the appellants were arrested and when the drugs were seized. We agree that the aforesaid names were not material witnesses insofar as the events which took place on the arrest and the seizure are concerned. However, the significance of Vincent, in particular, as a witness was not in respect of the narratives during the arrest and the seizure but in respect of whether he could confirm the first appellant's version that the meeting with Christina was at the request of Emmky in relation to the samples, which could lend credence to the first appellant's version that he knew nothing about the drugs. Viewed in that context, we do think that Vincent is a material witness and the failure to call or

to offer Vincent for cross-examination attracts the adverse inference under s 114(g) of the Evidence Act (see *Munusamy v Public Prosecutor* [1987] 1 MLJ 492; *Kamalahassan a/l Latchimanan v Public Prosecutor* [2008] 3 MLJ 810).

[34] On the exhibits, the essence of the argument by learned counsel for the first appellant was that there was a mixed up of the drug exhibits received by SP3 where SP3 had received other exhibit in relation to another police report. Having gone through the evidence of SP3, we find no merits in the ground raised by the first appellant. We are satisfied that there was no break in the chain of evidence. Lastly, we find no necessity to consider the issue of s 34 raised by the first appellant, pertaining to the need for the learned trial judge to view the evidence against each appellant separately, now that the original charge under s 34 has been amended.

[35] To conclude, except for the issue on exhibits, we find that there are merits in the appeals. Looking at the whole circumstances of the case, we do not think that the convictions of the appellants are safe. We unanimously allowed the appeals and set aside the convictions. The appellants are acquitted and discharged.

Appeals allowed and convictions set aside.

Reported by Kanesh Sundrum